# MUTUALITY OF REMEDY IN OHIO: A JOURNEY FROM ABSTRACTION TO PARTICULARISM

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*The author traces the development of the doctrine of mutuality of remedy in Ohio from its origination down to its present posture. He not only indicates how the law on mutuality of remedy has been liberalized, but offers an explanation of the reasons for this change.*

## I. INTRODUCTION

The genesis of "modern" equity springs from the harshness and confinement of a primitive common law system. When denied relief in the common law courts because of a tightly structured and inflexible writ system which refused to absorb new forms of action, litigants turned to equity as a means of obtaining satisfaction.[1] As the result of a concern with justice in the broadest sense,[2] chancellors gradually developed and systematized a body of rules or principles to be followed in decision-making and as a standard against which the conflicting claims of the litigants could be measured. The very essence of equity is summarized by these principles: "he who seeks equity must do equity . . . ; he who comes into equity must come with clean hands . . . ; equality is equity."[3]

On the other hand, equity has not been completely immune to the very same malady that precipitated its own birth. That problem is rule crystallization. A principle developed for the justice and convenience of a particular situation and for the peculiarities existing in the society of a given era has, on occasion, solidified into an unreasoned and immutable command that eventually does violence to the flexibility

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[1] For an excellent discussion of the interplay between law and equity *see* C. Allen, Law in the Making 366-408 (Oxford paperback 1961). *See generally* Adams, "The Origin of English Equity," 16 Colum. L. Rev. 87 (1916); Glenn & Redden, "Equity: A Visit To the Founding Fathers," 31 Va. L. Rev. 753 (1945).

[2] One commentator concludes that equity

> may be used to denote one of at least three different conceptions. It may mean: (1) a body of rules; (2) an historical source of rules in modern English Law; or (3) an abstract idea of justice, distinct from that which motivates the common law, and which may be the starting-point of new rules of law, which are termed 'equitable.'

G. Keeton, An Introduction to Equity 2-3 (6th ed. 1965).

[3] H. McClintock, Equity 52 (2d ed. 1948). *See generally* G. Keeton, *supra* note 2, at 55-78.

upon which equity is predicated. Perhaps the best example of equitable "hardening of the arteries" is the doctrine of mutuality of remedy.

In 1858 Edward Fry, an English jurist and legal scholar, remarked that "a contract to be specifically enforced must be mutual—that is to say, such that it might, at the time that it was entered into, have been enforced by either of the parties against the other of them."[4] Since Fry, in promulgating his version of the rule, was dealing with specific performance, the term "enforced" has been interpreted to mean a reciprocity of specific performance as a remedy.[5] As a practical matter, mutuality of remedy is applied both affirmatively and negatively. The plaintiff is allowed specific performance even though he would not be entitled to such relief if the defendant had been the aggrieved party; the plaintiff is denied specific performance if the defendant would not be entitled to the same relief had he been the injured party.[6]

Almost from the date the rule first appeared, it generated a plethora of criticism and confusion.[7] Courts immediately fell into the error of defining and discussing "mutuality" as an all-embracing general term with no distinction between remedy and obligation. On occasion, assent and consideration have been included under the umbrella of the term. The comprehensiveness of a word like "mutuality" invites frequent use of the term. Hence, it is not surprising to discover that it has been mistakenly employed to "hold a contract invalid because the obligation undertaken on one side is not commensurate with that undertaken on the other."[8]

Besides inviting indiscriminate and paralogistic application, mutuality of remedy suffers from serious conceptual defects. The use of the negative aspect of the rule, which is invoked more frequently and is more troublesome than the affirmative part, presupposes an unwillingness on the plaintiff's part to carry out his part of the bargain. Thus from the solitary fact that the defendant would not be entitled to

[4] H. McClintock, *supra* note 3, at 181. Mutuality of remedy as a broad concept is not indigenous to equity. It has been pointed out that "the common law has endeavored to work out this principle in terms of implied conditions . . . ." Durfee, "Mutuality In Specific Performance," 20 Mich. L. Rev. 289, 295 (1922).

[5] 5A A. Corbin, Contracts § 1180 (1964) [hereinafter cited as Corbin].

[6] When applied to the same fact situation the two formulations of the rule can create what has been called an "absurd" result. Corbin § 1178.

[7] One early critic remarked that "The rule as to mutuality of remedy is obscure in principle and in extent, artificial, and difficult to understand and to remember." Langdell, Note, 1 Harv. L. Rev. 104 (1887).

[8] W. Williston, Contracts § 105A at 424 (3d ed. Jaeger 1957). As a means of avoiding confusion, one writer suggests the use of the terms "equality of remedy," "identity of remedy," or "convertibility of remedy," rather than mutuality of remedy. Durfee, *supra* note 4, at 292 n.9.

specific performance, it is dogmatically concluded that the plaintiff would refuse to perform once he obtained relief. Yet the day to day exchanges of the commercial world refute such an assumption. Moreover, why should one who has suffered a breach of contract be denied the relief to which he would normally be entitled merely because the perpetrator of the breach would himself be unable to obtain specific performance. Refusing to grant specific performance because of these grounds is incompatible with the basic tenets of equity jurisprudence.

The rule frequently breaks down in operation. Fry noted four exceptions to the negative part of the rule in 1858.[9] Ames expanded the list to eight and succinctly articulated the growing dissatisfaction with the rule by remarking that "mutuality, as commonly expressed, is inaccurate and misleading."[10] Ames' discontent with Fry's version of mutuality resulted in the following restatement:

> [E]quity will not compel specific performance by a defendant if, after performance, the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract.[11]

Ames succeeded in diluting much of the mathematical severity of Fry's precise equation, but the rule propounded by Ames possessed a rigidity of its own. There might be occasions where the injustice of denying the plaintiff any relief would outweigh the possibility that the defendant could resort only to damages at law. As the inflexibility of Fry's rule carried the seeds of reaction, the formalism of Ames' restatement likewise invited expansion. Moreover, Ames' rule became subject to tensions nonexistent during the reign of Fry's approach to the problem. Specifically, a dramatic transformation in legal thought played a significant role in reshaping mutuality. The emergence of legal realism, manifested in an attack upon the citadel of mechanical jurisprudence, resulted in the erosion of the strict adherence to what had been considered immutable legal rules.[12]

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[9] Options or contracts on condition performable by one party; mutuality waived by subsequent conduct of the person against whom the contract originally could not have been enforced; contracts enforceable under the statute of frauds against only one party because he alone signed the writing; and cases of part performance with compensation.

H. McClintock, *supra* note 3, at 181.

[10] Ames, "Mutuality In Specific Performance," 3 Colum. L. Rev. 1, 8 (1903). Clark expanded the list to ten. G. Clark, Equity §§ 175-80 (1954).

[11] Ames, *supra* note 10, at 2-3.

[12] Cardozo gives much of the credit for the modification of the Fry and Pomeroy rules to the critical writings of law professors. Referring specifically to Ames, Lewis, Stone, and Williston he states: "I have little doubt that if the university professors had not intervened, the rule would have been extended by a process of purely logical

As a result of these cross-pressures, mutuality of remedy was converted into a more pliable doctrine that focused on competing equities and on a reciprocity of performances. Section 372 of the Restatement of Contracts reflects the view that emerged. Equity is satisfied if the defendant will not "be wrongfully denied the agreed exchange for his performance"[13] and if he "will not be compelled to perform specifically without good security that he will receive specifically the agreed equivalent in exchange."[14]

However, the codification of a legal formula does not always square with the reality of the courtroom. The adversary system of concrete and particularistic cases produces situations that in many instances fail to fit into the confines of what is assumed to be the "correct" view. This is inevitable and desirable; it is the substance of the creative life-force of our legal system. Perhaps this is what prompted Cardozo to note that one of the important characteristics of our legal system is a readiness "to subordinate logic to utility . . . ."[15] On the other hand, the disparity between what is thought to be a modern view and the results of day to day decisions may be due to an unwillingness to forsake the comfort and ease of outmoded and ritualistic thinking.

The purpose of this article is to trace mutuality of remedy in Ohio from its earliest appearance in recorded decisions up to the contemporary scene. An attempt will be made to focus on two interrelated lines of inquiry: (1) the shifting perspective adopted by the Ohio judiciary in recognizing and resolving mutuality of remedy, and (2) the present posture of the Ohio position as measured against the Restatement's flexible approach.

## II. The Formative Phase, 1823-1890

Mutuality of remedy received attention by the Ohio Supreme Court at least thirty-five years before Fry published his statement of

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deduction, and things would have gone from bad to worse." B. Cardozo, The Growth of the Law 14 (1924).

[13] Restatement of Contracts § 372, comment a (1932).

[14] *Id.* § 372 reads as follows:

(1) The fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party.

(2) The fact that the remedy of specific enforcement is available to one party to a contract is not in itself a sufficient reason for making the remedy available to the other; but it is of weight when it accompanies other reasons, and it may be decisive when the adequacy of damages is difficult to determine and there is no other reason for refusing specific enforcement.

[15] B. Cardozo, *supra* note 12, at 77.

the rule.[16] In 1799 James McNutt agreed to convey to John Hutcheson one-half of the land that McNutt had the opportunity to take title to under a military warrant. The agreement, signed only by McNutt, was predicated upon the condition that Hutcheson would furnish payment for half of the necessary expenses. Not until 1806, when a rise in land value undoubtedly spurred action, Hutcheson demanded his half of the property and offered to pay his portion of the expenses, but specific performance was denied. After noting that the plaintiff had failed to fulfill the condition precedent of advancing expense money, the court emphasized that had McNutt been forced to make the conveyance before receiving expenses, he would have had no recourse against the plaintiff if the latter refused to make payment. The reason for this conclusion was that the

> contract was not signed by both parties, so as to give mutual remedies. It is the contract of McNutt alone. Should the defendants therefore execute the conveyance before the payment of the money, they are left without recourse . . . .[17]

*Hutcheson* is a manifestation of the early mechanical application of the doctrine of mutuality of remedy. On one hand, it is entirely consistent with the corresponding equities of the contracting parties that the plaintiff should be denied relief until the defendant is assured of the fulfillment of the condition precedent. But to deny relief here because the defendant could not have asserted a claim against the plaintiff because of the statute of frauds is to ignore the circumstances. Here, Hutcheson relinquished the defense of the statute of frauds by submitting to the jurisdiction of the court. Even Fry recognized this as an exception to the rule.[18] Thus, in drawing upon Chancellor Kent's dictum that "equity will *never* decree performance where the remedy is not mutual, or one party only is bound by the agreement" (emphasis supplied),[19] the Ohio Supreme Court introduced a Draconian concept of mutuality of remedy that was considerably more restrictive than that later propounded by Fry.

Chancellor Kent's influence was persuasive 13 years later when the State was denied specific performance on a written agreement by which the defendant promised to lease or convey land for a canal.[20] But there was a slight shift in definitional orientation. The court concluded that since the contract required the governor's approval, which

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16 Hutcheson v. Heirs of McNutt, 1 Ohio 15 (1821).

17 *Id.* at 17.

18 H. McClintock, *supra* note 3, at 181.

19 Hutcheson v. Heirs of McNutt, 1 Ohio 15, 20 (1821).

20 State v. Baum's Heirs, 6 Ohio 383 (1834).

was missing, the State was not bound; therefore mutuality of remedy did not exist. This was a subtle but far-reaching alteration of Kent's rule. By stating that "specific performance will not be decreed when the remedy is not mutual, *as if only one party is bound by the agreement*" (emphasis supplied),[21] the court erased the distinction between mutuality of remedy and mutuality of obligation.

A point of interest is that the *Hutcheson* decision was ignored in favor of Chancellor Kent's dictum. More than likely this was due to the unavailability or lack of access to the published reports of Ohio decisions. On the other hand, it perhaps shows a greater trust in established and acknowledged authority, particularly when dealing with an unfamiliar doctrine.

With this background, mutuality became a term with elastic boundaries, sometimes denoting obligation, remedy, or even reciprocity of consideration. A case might be argued and analyzed in terms of obligation but resolved on the presence or absence of a mutual right to specific performance. Such was the result in *Richards v. Doyle*[22] where two owners of an interest in realty, one of whom was a married woman, sought specific performance against the vendee. The Supreme Court of Ohio acknowledged that a woman "not having capacity to bind herself to the performance of an executory contract, the party assuming to contract with her, is not . . . obliged to perform such contract on his part."[23] The contract was considered by the court to be void and unenforceable as to the married woman. Yet, viewing the contract in its entirety, mutuality of both obligation and remedy existed. The other vendor was bound and would have been subject to specific performance. Satisfied that there was a reciprocity of specific performance as to at least one of the plaintiffs, the court concluded that "the contract did not lack either mutuality or consideration."[24]

Despite the paucity of decisions, it is nevertheless evident that mutuality of remedy was a recognized doctrine in Ohio case law, though obviously there was a failure to properly distinguish remedy from obligation. Perhaps the factual content of the cases played a role in this confusion, or perhaps it was loose decisional draftsmanship. But the fact remains that mutuality of remedy first appeared in a restrictive, fairly well-defined form only to be merged with the nebulous concept of mutuality of obligation.

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21 *Id.* at 387.

22 36 Ohio St. 37 (1880).

23 *Id.* at 41.

24 *Id.* at 42.

## III. The Age of Pomeroy, 1891-1912

Even with this early confusion, mutuality of remedy was again recognized by the Ohio Supreme Court in 1891. In *Steinau v. Cincinnati Gas-Light & Coke Co.*[25] the defendant agreed to purchase all his gas requirements from the plaintiff. The defendant was obligated to use at least three quarters of his previous average gas consumption. A negative covenant precluded the "use on said premises [of?] oil lamps, electric lights, or other . . . power for general illuminating purposes . . . ."[26] The advent of the more economical electric lamp prompted the defendant to switch to electricity. The Gas Company attempted to enforce the negative covenant. Pomeroy's theory prevailed with the court stating that if the contract

> cannot be specifically enforced against [the plaintiff], then . . . he is not in general entitled to remedy of a specific performance against his adversary . . . although otherwise there may be no obstacle arising . . . to an enforcement of the relief against the latter individually.[27]

Thus mutuality was succinctly redefined in terms of reciprocity of specific performance and forcefully injected into the mainstream of Ohio case law. Yet in the same case the court predicted that the proliferation of exceptions to the rule would eventually cause it to be of little significance. This occurred in an extended discussion[28] reflecting concern over the balancing of equities between the rule itself and the *Lumley v. Wagner* qualification whereby negative covenants are enforced despite an absence of mutuality of remedy.[29] Four years later the part performance exception appeared.[30] A lessor rented his boat livery facilities to the plaintiff. The contract contained a clause whereby the plaintiff promised to "keep a first-class livery."[31] When the plaintiff sued to enjoin the defendant from ousting him from the livery so that the premises could be leased to a third party, the lessor con-

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[25] 48 Ohio St. 324, 27 N.E. 545 (1891).

[26] *Id.* at 326, 27 N.E. at 546.

[27] *Id.* at 332, 27 N.E. at 547. The plaintiff was, nevertheless, unable to obtain an injunction since he was unsuccessful in convincing the court that damages at law were unascertainable.

[28] *Id.* at 332-35, 27 N.E. at 447-48.

[29] The negative covenant poses two problems: (A) by granting an injunction the court is, in effect, enforcing a personal service contract and thereby interfering with the defendant's personal liberty; (B) the defendant would have been unable to obtain specific performance against the plaintiff, *i.e.*, no mutuality of remedy. Corbin § 1207.

[30] Hepburn v. Voute, 5 Ohio Dec. 311 (1895). The part performance exception had been recognized by Fry. *See* note 9 *supra.*

[31] Hepburn v. Voute, 5 Ohio Dec. 311, 313 (1895).

tended that the action should be dismissed because of a lack of mutuality of remedy. The defendant argued that since he would be without a remedy if the plaintiff decided not to abide by his promise to maintain a "first-class" boathouse, the mutuality rule required that the plaintiff be precluded from enforcing the rental contract. The court refused to invoke the *Steinau* doctrine. Instead, the part performance exception was recognized. A background of good faith compliance with the terms of the lease made it unlikely that the plaintiff would suddenly break his word once the jurisdiction of the court was lifted. The result of this common pleas court's uncomfortableness with *Steinau* was a pragmatic reconciliation of the harshness of mutuality with the exigencies of commercial reality.

Although not raised in *Hepburn,* an element implicit in the part performance exception is whether mutuality of remedy must exist from the instant the contract becomes binding or whether it is sufficient that there be mutuality at the time of litigation. Under the latter view, which is a dilution of the Fry rule,[32] equities such as partial performance can be taken into consideration. During the early 1900's the lower courts, with one noteworthy exception,[33] were unwilling to accept this modification. Thus the part performance exception was precluded from gaining acceptance.[34]

Furthermore, during this period the *Lumley v. Wagner* exception met resistance. A Cincinnati superior court refused to enforce a negative covenant by enjoining a theater from presenting performers other than the plaintiff since any deviation from Pomeroy would be contrary to the *Steinau* holding.[35]

The mood was thus one of adherence to a fixed doctrine. The

[32] The origin of this modification can be traced to the younger Pomeroy. "This change eliminated the large number of cases where relief was denied to a vender who had not good title at the time he contracted, but was able to perfect the title . . . ." H. McClintock, *supra* note 3, at 182.

[33] Trustee Co. v. Zimmer, 21 Ohio Dec. 657 (1910). Despite the fact that the "time of litigation" view was adopted, specific performance was denied on the theory that the defendant, once having entered into the leasehold, would have no remedy other than a legal one if the plaintiff failed to perform. Equitable relief would have been unavailable because:

> *The failure of the contract to embrace and provide the terms and conditions which such contracts usually contain and should contain, completely demonstrates that it lacks the usual essentials required of such contracts and renders it impossible for a court of equity to enforce its specific performance.*

*Id.* at 667.

[34] Of course under the Restatement view such a distinction becomes moot. Restatement of Contracts § 372 (1932).

[35] Hill v. Anderson, 6 Ohio N.P. 111, 10 Ohio Dec. N.P. 432 (Super. Ct. 1899). In addition to Steinau, the court relied heavily upon English authorities, including Jessel and Fry.

decisions in these cases were written in what Karl Llewellyn characterized as the "formal style." Mutuality of remedy opinions during the 1891-1912 period ran "in deductive form with an air or expression of single-line inevitability,"[36] thus driving "*conscious* creation all but underground, [making] change and growth things to be ignored in opinions, and to be concealed not only from a public but from a self."[37]

Yet, despite the dominance of *Steinau* and the imprint of the "formal style," an undercurrent toward modification was developing. The probing dictum that "many of the modern decisions have piled up so many exceptions to the rule . . . that it has almost become useless"[38] indicated an emerging dissatisfaction with Pomeroy's rule. But this displeasure remained dormant until 1938.

## IV. The Quiet Period, 1918-1938

For the twenty years between 1918 and 1938 the persuasiveness of *Steinau*, with its clearly articulated statement of the rule, literally disappeared from the scene. Only five cases involving mutuality of remedy survive in the reports from this period, none of which are Supreme Court of Ohio decisions; only three of the five can be considered directly on point.[39] In two of the three cases on point the application of the rules was fully justified. One dealt with the affirmative aspect of the rule. The plaintiff, a vendor of real estate, obtained a decree of specific performance on a contract since "the defendant could have invoked the remedy of specific performance had the plaintiff refused to convey . . . ."[40] The inadequacy of damages justified the court's conclusion.[41] Likewise the denial of specific performance where the plaintiff contracted to "care for, nurse and support defendants during their natural lives"[42] in exchange for the conveyance of realty

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[36] K. Llewellyn, The Common Law Tradition 38 (1960).

[37] *Id.* at 40.

[38] Trustee Co. v. Zimmer, 21 Ohio Dec. 657, 666 (1910).

[39] Decided on mutuality of remedy: Forro v. Buckeye Realty of Cleveland, Inc., 34 Ohio App. 299, 170 N.E. 878 (1929); Nunn v. Boal, 29 Ohio App. 141, 162 N.E. 724 (1928); Steel v. Murphy, 10 Ohio App. 150 (1918). Decided on mutuality of obligation: Herley, Inc. v. Harsch, 61 Ohio App. 260, 22 N.E.2d 515 (1938); Meir Grape Juice Co. v. Koehne, 3 Ohio L. Abs. 619 (Ct. App. 1925).

[40] Forro v. Buckeye Realty of Cleveland, Inc., 34 Ohio App. 299, 301, 170 N.E. 878 (1929).

[41] Corbin concludes that application of the affirmative rule poses minimal problems. The affirmative rule merely extends the remedy of specific performance to one who is in no serious need of it, and does no harm to the defendant except as it may increase the number of cases in which he can be deprived of a jury trial on issues of fact.

Corbin § 1179, at 329.

[42] Nunn v. Boal, 29 Ohio App. 141, 142, 162 N.E. 724 (1928).

was consistent with the basic precepts of equity. The personal nature of the plaintiff's duties were such that it would be impossible for a court to supervise and hence assure satisfactory performance.[43]

If the *Steinau* influence was suspended, the inflexible approach of the ancient *Hutcheson*[44] decision was not. The persistence of the reported opinion is, of course, a deeply imbedded feature of the common law. However, to rely on a decision some ninety-seven years old and thereby ignore the work-product of intervening judges is to invite questioning doubts. But this occurred in *Steel v. Murphy*,[45] the third of the three significant cases decided during the 1918-1938 period. Although the defendant contracted to convey land in fee simple he could only convey his undivided interest. Mutuality of remedy was absent. The defendant could not have obtained specific performance if he so attempted since equity will not force a vendee to accept less than that for which he bargained. Yet the equities of the situation were sufficiently compelling to justify an exception.[46] The court, nevertheless, refused to dilute the uncompromising *Hutcheson* rule. However, after reiterating the strict rule that "equity will never decree performance where the remedy is not mutual . . . ,"[47] they neatly sidestepped the issue by invoking the precise question technique in finding that this factual situation was not covered in the *Hutcheson* decision. In this way they could grant relief without destroying the rule. Here, unlike *Hutcheson*, the defendant possessed the power, on a unilateral basis, to satisfy mutuality of remedy requirements by acquiring full title to the property. Thus the defendant "if he had been able to produce a deed for the entire property, could have enforced specific performance against the plaintiff . . . ."[48] *Steel* serves to illustrate the hardships imposed by a blind commitment to an unrealistic doctrine.

## V. The Fact-Situation Approach of *Fuchs v. United Motor Stage Company*

The formalism of the *Steinau* statement of mutuality was put to rest by the Supreme Court in 1939.[49] Not only was the doctrine changed

[43] Corbin § 1184.

[44] *See* text accompanying note 18 *supra*.

[45] 10 Ohio App. 150 (1918).

[46] The theory being that "If the plaintiff is willing to overlook a defect in title or a shortage in area and to pay the full agreed price, he [should] not [be] deprived of his remedy by the fact that the vendor could not have compelled any performance by the plaintiff." Corbin § 1196.

[47] Steel v. Murphy, 10 Ohio App. 150, 154 (1918), citing Chancellor Kent.

[48] *Id.*

[49] Fuchs v. United Motor Stage Co., 135 Ohio St. 509, 21 N.E.2d 669 (1939), *noted in* 13 U. Cin. L. Rev. 586 (1939).

so as to conform to the relative equities of the contracting parties, but an endeavor was made to isolate and contain mutuality of obligation, a concept that had become the source of much confusion.

In 1930, Joseph Fuchs paid 7,500 dollars for 15 shares of stock in the United Motor Stage Company. Contemporaneously, Motor Stage, who operated a fleet of buses, agreed to purchase all its gas, oil, and grease supplies from Fuchs. The Company's duty to purchase was binding so long as the stock remained in Fuchs' ownership. In 1937, Motor Stage began to purchase the supplies in question from other sources, despite the fact that title to the stock still remained in Fuchs.

There was no question that requirements contracts were binding and enforcible. However, the Company argued that there was no mutuality of remedy here since the plaintiff-supplier had a right of termination; therefore his suit should be denied.

The court viewed this argument as a manifestation of the conceptual clash of the doctrines of consideration and mutuality of obligation. The two principles were acknowledged as being separate concepts. As to requirements contracts, "mutual promises are consideration one for the other;" therefore, "so long as there is consideration for the obligation of the defendant, it is not essential that there be mutuality of obligation."[50] As an abstract statement of a principle of law the court was correct. However, the issue involved a contract termination rather than a question of mutuality of obligation. Because of a failure to make this distinction the court erroneously spoke of mutuality of obligation when they should have addressed their attention to the enforcement of contract rights in favor of one having the power to terminate.[51] The court was confronted with a situation where, because Fuchs was not committed to furnishing supplies except so long as he owned the stock, the defendant could be enjoined from buying from other sources, but, while the ink was still wet on the decree, the plaintiff could unilaterally end his duty by disposing of the stock. What assurance did the court have that after the framing of the decree binding Motor Stage, Fuchs would not immediately and with impunity end the contract? Obviously, no assurance was possible.

Nevertheless, the negative covenant was specifically enforced. The existence of what was labeled "collateral consideration,"[52] in the form of the 7,500 dollars paid by Fuchs for the 15 shares of stock, set a time limit on the agreement. Having discerned the presence of "collateral consideration," the deal was analogized to an option contract where

[50] *Id.* at 515, 21 N.E.2d at 673.

[51] *Id.* at 518-19, 21 N.E.2d at 674.

[52] *Id.* at 519, 21 N.E.2d at 674.

"the optionee may enforce the contract and compel the optioner to sell at any time within the option period while he, as optionee, is not obliged to buy."[53] The analogy is a needless and confusing injection of mutuality of obligation. There is no dispute that the option requires consideration, which is usually executed. But reciprocity of obligation is unnecessary and, as a matter of fact, impossible. Here, there was sufficient consideration to support an enforceable contract because Fuchs promised to furnish all of the defendant's requirements, the latter agreeing to abide by the agreement so long as Fuchs retained the stock. Moreover, in the typical requirements contract, and under the Fuchs-Motor Stage agreement, the correct sense[54] of mutuality of obligation is present.[55] Thus given the presence of both consideration and mutuality of obligation, the analogy to the option becomes a meaningless gesture by the court.

The key to the court's endeavor to explain away the need for reciprocity of obligation can be attributed, as mentioned above, to the fact that power of termination was vested in the plaintiff. True, he was obligated to perform, but only so long as he desired. The only limiting factor would have been the time period required to find a purchaser and dispose of the stock. Hence, to grant relief under this set of facts would necessarily mean that the boundaries of Restatement section 372, and its guarantee to the defendant of "good security that he will receive specifically the agreed equivalent in exchange"[56] would be exceeded.

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53 *Id.*

54 Obtaining a consistent and precise definition of mutuality of obligation is difficult. Williston reasoned that to conclude that a contract is void for lack of mutuality of obligation "is still a way of stating that there must be valid consideration." W. Williston, *supra* note 8, at § 105A. If Williston's view is followed it means that exceptions, *e.g.*, infants contracts, unilateral contracts, and options, must be acknowledged. Corbin criticizes the merger of mutuality of obligation with consideration; he defines the former as meaning "that each party is under a legal duty to the other; each has made a promise and each is an obligor." And in the final analysis "it is consideration that is necessary, not mutuality of obligation." Thus the need for exceptions is eliminated. For example, in the option "the option giver's promise is enforceable, in spite of lack of mutuality of obligation." Corbin § 152. For a well-constructed criticism of Williston's view *see* Ballantine, "Mutuality and Consideration," 28 Harv. L. Rev. 121 (1914). *See also* G. Clark, Equity § 173 (1954).

55 Uniform Commercial Code § 2-306, comment 2 states that a requirements contract does not "lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure."

56 Restatement of Contracts § 372, comment a (1932).

Nevertheless the result was justified. The policy upon which section 372 is predicated is that courts should be provided with the opportunity to weigh the respective merits of each party's position.[57] Here two factors tipped the scales in favor of the plaintiff. He submitted himself to the court's jurisdiction—thus indicating a willingness to continue performance. More importantly, there was a substantial change of position on the plaintiff's part. He "expended large sums of money in the equipment and in providing sufficient service for the defendant . . . ."[58]

From the infrequency of subsequent reference[59] to the *Fuchs* decision it might be concluded that its liberal reasoning has had little, if any, impact on Ohio case law. Such a conclusion would be inaccurate. Consciously or otherwise, later cases do reflect the fact-situation approach utilized in *Fuchs*. For example, a sales contract provision giving the plaintiff buyer the right to forfeit a small deposit and thereby cancel his order for a new car, which meant that even if specific performance were granted the plaintiff could nevertheless withdraw his order, was ignored by a common pleas court on the basis that the post-war scarcity of automobiles made it more than likely that the plaintiff would go through with the deal.[60] Likewise, a court of appeals decision continued the fact-situation approach of *Fuchs* by justifying the Statute of Frauds exception with a policy declaration that "While mutuality of remedy may be a satisfactory test in some cases, it is not a rule of universal application to which all other principles of equity jurisprudence pay homage . . . ."[61] This statement bears a striking but not unexpected resemblance to the *Fuchs* syllabus.[62]

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[57] *Id.*

[58] 135 Ohio St. 509, 511, 21 N.E.2d 669, 671 (1939).

[59] Central New York Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 135 181 N.E.2d 506, 512 (C.P. 1961), negative covenant in professional basketball player's contract enforced. Mose Cohen & Sons, Inc. v. Kuhr, 85 Ohio L. Abs. 302, 308 (C.P. 1959), negative covenant whereby defendant agreed not to engaged in scrap sheet iron baling operations enforced.

[60] DeMoss v. Conart Motor Sales, Inc., 34 Ohio Op. 535 (C.P. 1947). In support of its conclusion, the court reasoned that "the equities of the case leave no other alternative. The plaintiff is asking for no more than is just and proper. Furthermore compliance with the court's order certainly works no hardship whatsoever on the defendant. It is only being ordered to perform its contract, which will result in a profit (commission) to it." *Id.* at 537.

[61] Ward v. Bickerstaff, 79 Ohio App. 362, 366 (1946), citing Restatement of Contracts § 372 (1932).

[62] *See* note 80 *infra*, and accompanying text.

## VI. Present Posture of Mutuality of Remedy: A Shift From Abstractionism to Particularism

The classical version of mutuality of remedy, as reflected by the Fry, Pomeroy, and Ames' series of statements, is no longer recognized in Ohio. In light of the extensive quotations from Restatement section 372 by the court in *Fuchs* it might be assumed that the *Hutcheson* and *Steinau* dogmatisms have been replaced by the Restatement of Contracts view. However, section 372 is based on the existence of "good security,"[63] a concept designed to assure the defendant that he will receive "specifically" that for which he bargained.[64] The security must be tangible or demonstrable and must meet the qualitative standard of being "good."

Does the factual content of *Fuchs* measure up to these requirements? Did the investment by Fuchs of "large sums of money" in equipment constitute "good security" for his counter-performance? In Ohio it certainly did. In reaching this conclusion the court undertook to define the Restatement's security standard.[65] To equate change of position by the plaintiff with sufficient security is to define the latter phrase in terms of probabilities. Mere change of position, no matter how substantial, can never constitute *conclusive* assurance of continued performance. In addition, change of position appears in various shades and in a wide assortment of forms; consequently any inquiry must culminate in a subjective value judgment. The most that can be said for a particular change of position is that it *might* make the failure of return performance extremely unlikely.

Thus based upon the expressions found in the *Fuchs* opinion, Ohio's mutuality of remedy standard is slightly more liberal and elastic than that propounded by the Restatement. If counter-performance is at

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[63] Restatement of Contracts § 372, comment a (1932).

[64] *Id.*

[65] Justice Hart ignored §§ 373 and 376, both of which have a direct bearing on § 372. Under § 373

> specific enforcement may properly be refused if a substantial part of the agreed exchange for the performance to be compelled is as yet unperformed and its concurrent or future performance is not well secured to the satisfaction of the court.

Section 376 states that specific performance will not be refused a plaintiff "merely because he has a power to terminate, . . . unless the power can be used in spite of the decree in such a way as to deprive the defendant of the agreed exchange for his performance." Section 376 would be applicable to the *Fuchs* situation because, among other things, it applies "where the party having the power of termination has rendered part performance or . . . materially changed his position in reliance on the contract." Restatement of Contracts § 376, comment b (1932).

least probable, the court is free to grant specific performance. Hence, the decision as to whether specific performance will or should be granted turns upon the fact situation itself.[66] Under a fact-situation approach the court is not bound to the immutable abstractions of Fry and Pomeroy. Instead, it can endeavor to shape a result more compatible with the flexible norms of equity.

A. *The Influence of External Pressures*

The gradual shift by the Ohio courts from abstraction to the particularistic, which is manifested through an interest in achieving a "just" solution relative to the litigants before the court at a given instant, is in conformity with the broad historical movement of the law. Such a conclusion is to do no more than acknowledge that legal problem resolution is, in the final analysis, geared to the ferment arising from the social, political, and economic environment of the nation.[67]

In the beginning of Ohio's industrial development, contractual relationships required a high degree of protection. It was necessary that all parties to a transaction be assured of absolute reciprocity of performance. The most efficacious manner by which courts could comply with this need was through a decision-making process geared to predictability. As a result of the environmental needs of "The Age of Pomeroy" and "The Quiet Period," merchants were, for one, assured of the protection of a right to freedom of contract. During this period,[68] the Supreme Court of the United States imposed a creed of economic *laissez faire* upon the nation with such gusto that Mr. Justice Holmes was prompted to utter his classic complaint that "a constitution is not intended to embody a particular theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."[69] Secondly, merchants were sure to receive consistent responses from the courts on any legal problem that might arise. The effect of this consistency of response was to provide capitalists with a foundation of confidence and foreseeability that was necessary.

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[66] Such a view is not incompatible with Ohio Rev. Code Ann. § 1302.90(a) (Page 1962): "Specific performance may be decreed where the goods are unique or *in other proper circumstances*." (Emphasis supplied.)

[67] For an in-depth study of the relationship between the resolution of questions of contract law and the economic, social, and political moods of the community at a given time *see* L. Friedman, Contract Law in America (1965).

[68] *See generally* S. Fine, Laissez Faire and the General-Welfare State (1956); R. Hofstadter, Social Darwinism in American Thought (rev. ed. 1955).

[69] Lochner v. New York, 198 U.S. 45, 75 (1905).

As the economy matured, and as new social and political pressures were generated, the balance between the need for abstraction and predictability on one hand, and a concern for an equitable solution at a given time on the other hand, tipped in favor of the latter. As one commentator summed up this change:

> The Courts have moved from a policy of aiding the functioning of the market as their primary goal . . . to one of carrying out the reasonable expectations of the parties in a particular transaction . . . .[70]

Another significant factor in the change was the controversial repudiation by the so-called "realists" of mechanical jurisprudence. Upon shattering the illusion that law is or can be made approximately stationary and certain,[71] the influence of external factors upon the decision-making process became a part of the legal scene. The mutuality of remedy decisions became a small part of the trend away from legal abstraction toward a particularistic approach emphasizing fairness.

### B. *The Role of the Syllabus Rule in the Development of Mutuality of Remedy*

In Ohio the "law" of each Supreme Court decision appears in a court prepared and approved syllabus.[72] Since the adoption of the syllabus rule in 1858, the issue of mutuality of remedy has come under

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[70] Macaulay, Law and the Balance of Power: The Automobile Manufacturers and Their Dealers 2 (1966). Perhaps the most extreme manifestation of the contemporary particularistic concern of the legal system is registered in the "unconscionable" contract provision first developed as part of the Uniform Commercial Code § 2-302.

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Ohio Rev. Code Ann. § 1302.15(A) (Page 1962).

[71] *See generally* J. Stone, Legal System And Lawyers' Reasonings (1964).

[72] A syllabus of the points decided by the Court in each case, shall be stated, in writing, by the judge assigned to deliver the opinion of the Court, which shall be confined to the points of law, arising from the facts of the case, that have been determined by the Court. And the syllabus shall be submitted to the judges concurring therein, for revisal, before publication thereof; and it shall be inserted in the book of reports without alteration, unless by consent of the judges concurring therein.

5 Ohio St. vii (1858). This is now Rule VI of the Supreme Court Rules of Practice. *See also* State *ex rel.* Donahey v. Edmondson, 89 Ohio St. 93, 107-8, 105 N.E. 269, 273 (1913).

the Ohio Supreme Court's consideration four times.[73] In two cases, one of which was the influential *Steinau* decision,[74] there was no express syllabus reference to the doctrine. In another decision the full extent of syllabization is contained in the word "mutuality"[75] without any qualifying terms. The first and only complete syllabization of the rule appeared in *Fuchs*:

> So long as there is consideration . . . it is not always essential that there be mutuality of remedy . . . to enable the seller to specifically enforce the obligation of the buyer to purchase under such contract.[76]

It is apparent that without a simultaneous reading of the text of the *Fuchs* opinion, the syllabus statement of the rule is of little *stare decisis* value. To say that "it is not always essential that there be mutuality of remedy"[77] is to do more than recognize the existence of exceptions—something that even Fry was prepared to do. Express reference to the "good security" standard is lacking. Moreover if the syllabus rule is narrowly applied, it can be argued that the doctrine of mutuality of remedy never existed until it appeared in the Fuchs syllabus. Such a conclusion is clearly wrong. Certainly the *Steinau* doctrine was effectively sustained.

A citation profile of the thirty-five cases discussing the mutuality of remedy problem reveals a tendency by the courts to ignore syllabus reference in favor of text, case, and treatise citation. Treatise reference dominated decision drafting by six out of fourteen cases during the *Steinau* era, 1891-1912, resulting in the Pomeroy statement taking on the character of a syllabus.[78]

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[73] Fuchs v. United Motor Stage Co., 135 Ohio St. 509, 21 N.E.2d 669 (1939); Wiedemann Brewing Co. v. Maxwell, 78 Ohio St. 54, 84 N.E. 595 (1908); Steinau v. Cincinnati Gas-Light & Coke Co., 48 Ohio St. 324, 27 N.E. 545 (1891); Richards v. Doyle, 36 Ohio St. 37 (1880).

[74] The other case is Richards v. Doyle, 36 Ohio St. 37 (1880).

[75] "Written agreements known as options are not necessarily void for lack of mutuality . . . ." Wiedemann Brewing Co. v. Maxwell, 78 Ohio St. 54, 84 N.E. 595 (1908).

[76] 135 Ohio St. 509, 21 N.E.2d 669, 670 (1939).

[77] *Id.*

[78] Professor Friedman labels this period "the golden age of contract." After noting that it was an era dominated by "great expository treatises," he says

> The abstract, negative, and impersonal character of classical contract law made it relatively simple to freeze contract law into what Professor Page, writing in 1905, called a "rational and harmonious system." The treatise-writers wove contract law into a set of "scientific" principles, logically interrelated and stated in an orderly manner. . . . On paper at least, the treatises transformed the living law of contract into a fabric of black-letter rules—a kind of unwritten and sluggishly evolutionary civil code.

L. Friedman, *supra* note 67, at 211.

Clearly, if the development and expansion of mutuality of remedy depended solely upon syllabus amplification it would never have attained its present posture.[79] What did occur was that the rule evolved completely within the analytical give and take of responsive decision drafting, for the most part independent of the syllabus.[80]

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[79] One might conclude that the syllabus rule, as a legacy of the age of mechanical jurisprudence, is generally ignored by Ohio courts.

[80] Of the two cases citing *Fuchs*, Central New York Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 135, 181 N.E.2d 506, 512 (C.P. 1961), relied on text while the other, Mose Cohen & Sons, Inc. v. Kuhr, 85 Ohio L. Abs. 302, 308 (C.P. 1959), utilized the syllabus.

The overall effectiveness of the syllabus system is open to serious question. Karl Llewellyn, after 1939 and 1953 studies of Ohio Supreme Court opinions concluded that not even a syllabus system can escape from the fact that:

> Divergent, mutually inconsistent precedent techniques are at work in the daily mine-run of appelate cases. The little case, the ordinary case, is a constant occasion and vehicle for creative choice and creative activity, for the shaping and on-going reshaping of our case law. (Emphasis deleted.)

K. Llewellyn, The Common Law Tradition 99 (1960). *See generally* Report of the Cincinnati Conference on the Status of the Rule of Stare Decisis, 14 U. Cin. L. Rev. 203 (1940).